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In the matter of the Arbitration between the Corporation of the City of Toronto and John Leak.

Toronto esplanade—Arbitration under 16 *Vic., ch.* 219, *and* 20 *Vic., ch.* 80—*Right of water lot owners to be re-paid for expense of esplanade if made by them—Objection taken to award not apparent on its face—Award by two arbitrators, without consulting third as to letter from attorney for the city.*

Per *Hagarty*, J., and *Morrison*, J.—Under the acts relating to the Toronto esplanade, the owners of land taken by the city have no right to claim the expense incurred by them in constructing the esplanade as an addition to the value of such land. *Draper*, C. J., expressed no opinion on this point.

Per *Draper*, C. J.—On a reference under these acts the award cannot be set aside on affidavits shewing that such a claim has been allowed, where this does not appear on the face of the award. Per *Hagarty*, J., in a case like this the objection might be entertained, though not on an ordinary reference by consent.

The three arbitrators, C., D., and M., having met and discussed all the matters referred, separated, unable to agree, M. expressing his dissent as final. On the next day the attorney for the city wrote to D. requesting that the amounts found on the different heads of claim might appear on the face of the award, so that they might be able to obtain the opinion of the court, stating that the letter was intended for D.'s colleagues as well as himself, and desiring that the claimant's attorney should be made aware of it. C. and D. considered this communication and determined to disregard it, but no notice of it was given to M., and an award was made two days afterwards by C. and D., without further consulting him in any way.

Per *Hagarty*, J., and *Morrison*, J.—It was the duty of the other two arbitrators to notify M. of this letter, and of their intention to settle and execute the award.

Per *Draper*, C. J.—They were not bound to do so, for their disagreement was fully and finally understood when they separated, and the letter disclosed no new facts or evidence.

The award was therefore set aside on this ground, *Draper*, C. J., dissenting.

The sum awarded was directed to be paid forthwith, whereas the statute allows a year from the award, or from any rule of court ordering payment: but, *held*, that this part of the award, which was clearly bad, might be separated from the rest.

The submission in this case contained an agreement that it should be made a rule of court, and the jurisdiction over the award was therefore held to be clear.

Dalton obtained a rule *nisi*—on reading the rule of court containing the submission in this matter, a copy of the evidence taken by the arbitrators thereon, and a copy of the award, and certain affidavits and other papers—calling upon John Leak to shew cause why the said award should not be set aside with costs, on the following grounds:—

1st. That the arbitrators have included in their award, in their valuation of the land taken from the said John Leak for the purposes of the esplanade in the city of Toronto, the assumed expense incurred by the said Leak in partially constructing the esplanade, contrary to the statute 20 Vic., ch. 80.

2. That the valuation of the land by the arbitrators is extravagantly large and unjust.

3. Because the arbitrators have ordered the payment by the corporation of the city of Toronto of the sum therein mentioned forthwith, whereas by the said statute the money cannot be so made payable.

4. Because the two arbitrators who alone made the award did so without duly consulting their co-arbitrator, Alexander Manning, and had meetings at which he was not present, and of which he had no notice, and had no opportunity of being present; and in particular did not consult him as to the form of the award, nor as to the matters contained in the letter of the said Dalton, a copy of which is filed, nor did they give him notice of the said letter, nor of any meeting for executing the award;

And upon other grounds appearing in the affidavits and papers filed.

The submission was by bond, and recited that differences had arisen between the parties touching a water lot owned by Leak, across which the esplanade was built, and the claim of the corporation for the construction of the esplanade and the filling in the water lot, and the value of the land taken from Leak for the purposes of the esplanade, and the value of the strip of land between high-water mark and the top of the bank, and of the land between the former southern limit of his lot and the windmill line given, if any such, to the said John Leak, in pursuance of the acts of the provincial parliament relating to the Toronto esplanade, and the increased value of the lot by means of the said improvements; and the condition was that the parties should abide by, &c., the award of Frederick Cumberland, the arbitrator appointed by Leak, and Alexander Manning, the arbitrator nominated by the city, and John Stoughton Dennis, the third arbitrator agreed upon by both parties; so that the arbitrators, or any two of them, made and published their award in writing on or before the first day of November then next.

This submission was made a rule of court, pursuant to an agreement contained therein.

The award was made by two of the arbitrators only, *i.e.*

by Cumberland and Dennis, and was dated the 19th of October, 1863. It recited the submission, and awarded "that the corporation of the city of Toronto do forthwith pay to the said John Leak the sum of three thousand and sixty-six dollars, being the value of the land taken from the said John Leak by the said corporation for the purposes of the said esplanade, over and beyond the claim of the said corporation for the building and construction of the said esplanade, the filling in of the said water lot, the increased value of the said water lot by means of the said improvements, as well as the value of the strip of land between high water mark and the top of the bank."

The affidavit of the attorney for the corporation stated:

1. That the claim of the corporation was for the construction of the esplanade across a water lot in the city of Toronto, owned by Leak, and for filling in his lot, and there was also the valuation of lands given by the corporation to Leak, and of lands taken from Leak by the corporation for the esplanade.

2. That one of the principal questions argued before the arbitrators, was the right of Leak to add to the value of the hundred feet of land across the breadth of his lot taken for the esplanade by the corporation the expense of the construction of the esplanade upon his lot, which had been nearly altogether constructed by Leak himself.

3. The affidavit verified a copy of the evidence taken on the arbitration, and the copy of the award served upon the attorney for the corporation by the attorney for Leak.

4. It verified a copy of a letter written by the attorney for the corporation, and stated that it was delivered to one of the arbitrators, (Dennis,) who read the same to Leak's attorney: that Dennis stated that the award was not then made, and afterwards said it was made on Monday, the 20th of October last, (1863.)

5. That the evidence, (as verified,) together with a copy of a grant to the corporation of certain strips of land and water lots in the city of Toronto, bearing date the 21st of February, 1840, and a certificate of the surveyor of the city of Toronto, filed with the affidavit, constituted the whole of the evidence before the arbitrators.

The letter above mentioned was as follows, addressed to J. Stoughton Dennis, Esq.

"Toronto, 17th October, 1863.

DEAR SIR,

Re Leak and the Corporation of the City of Toronto.

In this case I have to request that you will have the amounts found by the arbitrators upon the different heads of claim on either side appear upon the face of the award.

I refer here particularly to an item of claim by Mr. Leak for the land taken for the esplanade. You are aware that I have strenuously argued that the filling done by Leak upon the esplanade cannot be added to the price of his land. The amount of this item is large, about £700, and the arbitrators cannot have arrived at an award without coming to a decision upon it.

I have a strong opinion on the question, and in justice to my clients I must endeavour to take the decision of a court upon the subject, should you decide that Mr. Leak is entitled to add to the value of the 100 feet the assumed expense incurred by him in filling it up.

It is the practice of every court, as far as I know, to afford facility to parties in taking the opinion of the ultimate authority upon points of law. A judge will always, for such a purpose, give his reasons at length. I am sure I only do you justice in supposing that you wish law and right to prevail, and that it would be impossible that you should attempt to cover up, by the form of your award, the real ground of decision, by which parties who have chosen you as a judge between them may be precluded from obtaining the opinion of a higher court upon important questions of law, involving a large amount of money.

I write this very hurriedly. You have already expressed to me, in conversation, that you decline to accede to my view, but I think it my duty to put the above in writing, and further, to beg you to consider well whether it can be right that the award should be in such a form that the city cannot take the opinion of the courts of law upon so pure a question of law, and upon which the rights between the parties must almost wholly depend.

I write this for your colleagues and yourself, and of course desire Mr. Vankoughnet" (Leak's atttorney) "to be made aware of it."

The affidavit of Manning, the arbitrator appointed for the

city, stated (among other things) that during the arbitration a question arose, which was very much debated, whether Leak was to have allowed to him in the valuation of the hundred feet taken for the esplanade the expense which it was alleged he had been put to in constructing the esplanade: that after the parties had concluded their cases, the arbitrators met on the 16th of October last, and they all agreed that the price to be allowed the city for filling Leak's lot, and for the work done by the city on the esplanade thereon, should be $715.62: that beyond that he, Manning, did not agree with the others, but the following matters were then discussed: the land to the north, extending from the top of the bank to the water's edge, being ten feet deep, by the breadth of Leak's lot, was valued by the other arbitrators at $250, to which he objected. The hundred feet taken for the esplanade by the city was valued to Leak at $5,280 (being at the rate of £20 per foot, upon a frontage of sixty-six feet, of the depth of one hundred feet) by the other two arbitrators, who then charged against Leak the sum of $1,760, being one-third of the said $5,280, for the increased value of the lot by reason of the improvements, the whole making together, upon a balance, the sum of $2,554.38 in favour of Leak. Manning did not agree to any of this. The other two arbitrators contended that Leak was entitled to the amount for the work which he had done upon the esplanade, Manning being of a contrary opinion, as well as upon the value of the land, which, at that rate, he calculated would be about $34,800 per acre. Dennis said his mind was fully made up, and proposed that they, without Manning, should go from Mr. Cooper's office, where they then were, to his (Dennis') office, further to consider their award. They went to Dennis' office, but Manning did not go in with the other two:

That he, Manning, never was present at any further meeting or discussion, nor had he notice of any other meeting of the arbitrators, except that he knew the other two arbitrators went, as above stated, to Dennis' office: that he did not hear of the letter written by Mr. Dalton until after the award was made, and was never consulted by them about it:

that he never had notice of any meeting to sign the award, nor that the award was ready for signature, and he never was asked to sign it; and he believed the amount awarded to Leak did contain the alleged expense incurred by Leak in filling in the esplanade on his land, but he did not know the fact.

On the other side were filed the affidavits of the two other arbitrators.

Mr. Cumberland's affidavit stated that, having heard all the evidence, the three arbitrators met to discuss it, and consider the award: that after much discussion Manning at last declared that any agreement was impossible: that the other two arbitrators expressed themselves equally determined in their view, and Manning said that, under those circumstances, he could not sign the award, and they might consider him "out:" that after some further conversation Manning repeated this, and that the other two must go on, and make their award alone: that Dennis proposed that Manning, having declined to sign any award in accordance with their views, the other two should at once proceed to close the matter, and adjourn over to his office: that up to that time every thing that formed the basis of the award had been discussed, and no item was afterwards introduced to ground the award on, but what had been fully discussed in Manning's presence: that they all walked together to Dennis' office, discussing the matter on the way, and, at the door, Manning voluntarily parted from them: that Manning well knew that it was to make up the computations, and to draw up the award, if possible, there: that they went to Dennis' office, there being no light at the other office: that they never had any further or other meeting, till they met again to sign the award, and had there been the slightest reason to believe that Manning would have signed the award, it would not have been signed without giving him an opportunity of being present.

The affidavit of Mr. Dennis stated that he had read Mr. Cumberland's affidavit, and that it was substantially and literally true, and it contained no statement of fact not contained in Mr. Cumberland's affidavit.

In each of these affidavits was a statement that no attention was paid to Mr. Dalton's letter.

M. R. Vankoughnet shewed cause, and cited 16 Vic., ch. 219; 20 Vic., ch. 80; Great Western R. W. Co. and Light, 1 P. R. 378; Lancaster v. Hemington, 4 A. & E. 345; Miller v. Shuttleworth, 7 C. B. 105; Phillips v. Evans, 12 M. & W. 309; Bouttilier v. Thick, 1 D. & R. 366; Scobell v. Gilmour, 5 U. C. R. 48; Corporation of Kingston v. Day, 1 P. R. 142; Aitcheson v. Cargey, 2 Bing. 199; Rees v. Waters, 16 M. & W. 270; Faulkner v. Saulter, 1 P. R. 48; Hobdell v. Miller, 6 Bing. N. C. 292; Russ. on Arb. 62, 316, 656; Rex v. Shillibeer, 5 Dowl. 238; Watson v. McCullum, 8 T. R. 520; Rex v. Bardell, 5 A. & E. 619; Jackson v. Clarke, McCl. & Y. 200; Martin v. Kergan, 2 P. R. 370; Helps v. Roblin, 6 C. P. 52; *In re* Pering and Keymer, 3 A. & E. 245; Goodman v. Sayers, 2 Jac. & W. 249; Fuller v. Fenwick, 3 C. B. 705; Little v. Newton, 2 M. & G. 351.

Dalton, contra, cited *In re* Lee and Hemingway, 3 N. & M. 860; Harries v. Thomas, 2 M. & W. 32; Emery v. Wase, 8 Ves. 505.

The court differing in opinion delivered their judgments *seriatim*.

MORRISON, J.—The rule *nisi* on this application was moved on four grounds, but as my judgment turns solely upon the fourth, it becomes unnecessary for me to consider or express any opinion upon the other objections.

The fourth ground of objection is, that the two arbitrators made their award without duly consulting their co-arbitrator, Manning, and had meetings at which he was not present, and of which he had no notice, and had no opportunity of being present, and in particular did not consult him as to the form of the award, nor as to the matters contained in the letter of Mr. Dalton, nor give him notice of that letter, nor of any meeting for executing the award.

After the best consideration I have been able to give the subject, I am opinion that the rule should be made absolute for setting aside the award.

It appears from the affidavits filed, that on the 17th of

October last—the day after the three arbitrators had a meeting, and discussed the award and separated, unable to come to a unanimous decision, and two days before the award was made—Mr. Dalton, the counsel and agent acting on behalf of the corporation, made a formal communication in writing, addressed to the third arbitrator, Mr. Dennis, dated 17th October, 1863: (*a*) that on the same day this document was handed to Dennis, who in the presence of Mr. Dalton read it to Mr. Vankoughnet, the counsel for Leak; and that he, Dennis, at the same time informed Mr. Dalton that the award was not then made.

It further appears that no notice or intimation of this communication was made to Manning, nor had he any knowledge of it: that he never was consulted by the other arbitrators on the subject of it: and that he had no notice of any meeting to discuss it, or to finally settle the form of or sign the award, or that it was ready for signature. And he, Manning, swears that if he had known of Mr. Dalton's communication he should have desired to discuss it. It appears by Mr. Dalton's affidavit that Dennis informed him the award was executed on the 20th of October.

The award itself purports to be made by the three arbitrators, but it is only signed by two. Dennis in his affidavit states, in reference to Mr. Dalton's letter, that "he considered it unnecessary to pay attention to or be guided by it," and Cumberland in his affidavit states that "he considered it out of place, and paid no attention to it." It is therefore clear that both Messrs. Dennis and Cumberland did before the making of the award consider the matter of the communication, and that apart from Manning, and without any notice to him of its receipt or contents, notwithstanding the letter itself intimated that it was intended for the consideration of all three. It can hardly be contended, under the peculiar circumstances of this case, that the withholding the grounds upon which the arbitrators arrived at the conclusion they did, and by doing so depriving the applicants of the advantage of obtaining the opinion of the court upon the legal construction of the statutes under which the arbitrators were acting, was not a most important

(*a*) See the letter set out, ante, page 224.

and material matter to be considered and discussed by the three arbitrators before finally settling the award. This application itself conclusively shews that such was the case. The fact of the two arbitrators being of opinion that they would not have been influenced in changing their determination, or that Manning would have varied his objection, is beside the question. It is unnecessary to consider or speculate what effect such a proposition might have had upon the mind of Manning, or how far it might have modified his views, further than as it appears by his affidavit, the chief matter upon which he disagreed with his co-arbitrators was in reference to the legal right Leak had to any allowance for the filling in or amount of work he had done upon the esplanade, (the principal point referred to in Mr. Dalton's letter.)

If a final or other meeting or consultation had been held by the three arbitrators to discuss the propriety of drawing up the award in accordance with Mr. Dalton's proposition, the main question, as I have said, depending upon the construction of the statute, he, Manning, might have agreed to an award setting out the objectionable item, with a view of having the point settled by the court, and by his so assenting might have influenced the other two arbitrators, or one of them, to agree to the not unreasonable request of Mr. Dalton, and to the award being drawn in accordance with it.

It is in this view of the case I think the rule quoted by the late Mr. Justice *Burns* in Martin v. Kergan, (2 P. R. 374,) is applicable, namely, "That the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings, brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just conclusion."

On the 16th the three arbitrators separated, unable to agree. On the 17th Mr. Dalton's letter was received by Mr. Dennis. On the 19th the other two arbitrators met, and without any notice or any further consultation with Manning settled and executed their award. In my opinion it was the duty of the two arbitrators, after the receipt of Dalton's com-

munication, and before they made their award, to have notified Manning of their intention finally to meet, settle, and execute the award, and to have afforded him an opportunity of being present if he so thought proper. If he refused or neglected to attend, the two arbitrators in that case would have been justified in proceeding and making their award.

Courts are not inclined to favour applications of this nature, but rather strive to uphold awards; and if I entertained doubts as to the merits of the present application, I should have regretted to have been compelled to arrive at the decision of making the rule absolute; but when I look at the circumstances of the case I am relieved from all difficulty, for if—as contended and strongly pressed by the counsel for the applicants on the argument, and borne out by the affidavits filed, and not denied by Leak or by either of the two arbitrators—the arbitrators allowed Leak the cost or expense of the filling in of the esplanade across his lot, I have no hesitation in saying that in my opinion the arbitrators acted contrary to the express intention of the legislature. I mention this not as having any bearing on my judgment, but because the parties may desire to have my opinion on the point.

HAGARTY, J.—I regret the existence of any difference of opinion in the court on some points of this case. They are, however, more as to the somewhat unsettled practice in dealing with compensation awards, than as to any important principle of construction.

I shall first consider if the very important question raised by Mr. Dalton, as to the propriety of allowing to Leak, as part of the value of the 100 feet, the cost incurred by him in filling it up, be open to us on this motion against an award not shewing upon its face any determination on such a subject.

I agree that in an ordinary award voluntarily entered into between parties, who are willing to transfer all matters of law as well as of fact from the decision of the courts to that of selected referees, it would not be open; but I am of opinion that a reference like that before us stands on a somewhat different footing.

It may be urged that our jurisdiction to deal with the award may rest wholly on the agreement of the parties to make the submission a rule of court. The statutes governing the reference contain no express words as to any interference by a court of law or equity, beyond the expressions in section 5 of the act of 1857, 20 Vic., ch. 80, as to the payment of moneys by the corporation "within one year from the date of the decision of the said arbitrators, or from the date of any rule of court ordering the same;" and again, "from the time a certificate of the said decision of the said arbitrators, signed by them, or a certificate of a rule on any appeal under the seal of the court from whence it issues."

The framers of this section doubtless regarded the awards made under the statute to be subject to review by the courts.

I refer to some remarks of the late Sir *J. B. Robinson* as to the difference between the two classes of awards, compulsory and voluntary, in the cases of The Great Western Railway Company and Baby and others, (12 U. C. R. 117, 120.)

Cockburn, C. J., in Hodgkinson v. Fernie, (3 C. B. N. S. 201,) made this suggestive remark, "One word as to the inconvenience which, it has been suggested, might arise from holding parties conclusively bound by the decision of an arbitrator upon a nice and intricate point of law, in cases where a mere question of amount of damages is referred to him. That inconvenience, if it be one, may always be obviated by introducing into the submission or order of reference a clause enabling either party to call upon the arbitrator to reserve any question of law that might arise for the decision of the court." * * * After quoting the provision thereon in the Common Law Procedure Act, he says, "That course might have been taken here; but it does not appear that the arbitrator was called upon by either party to do so. They have, therefore, no ground for complaining that their rights are concluded by the award."

In a case under the imperial statutes, "The Lands Clauses Consolidation Act, 1845," and "The Railways Clauses Consolidation Act, 1845," 8 & 9 Vic., ch. 18, and 8 & 9 Vic., ch.

20—*In re* Brogden and the Llynvi Valley R. W. Co., (9 C. B. N. S. 229,)—objection was taken to an award of compensation on the ground that the arbitrators had included in the amount awarded certain illegal claims. In shewing cause it was pressed upon the court that it must be treated as an ordinary award, and that being good upon its face the court would not entertain a suggestion that the arbitrator had erred in fact or in law, referring to Hodgkinson v. Fernie, &c., &c.

The opposing counsel fully conceded this to apply to ordinary awards, but urged that "the reasoning applicable to ordinary references, where the parties select their own tribunal, and have the means of agreeing beforehand as to what shall be the subject of enquiry before the tribunal so selected, is altogether inapplicable to references under the Lands Clauses Consolidation Act."

The court took time to consider the judgment, subsequently delivered by *Erle*, C. J. He does not notice the objection as to the illegal compensation not appearing on the face of the award, but proceeds to a full consideration of the merits and of the proceedings of the arbitrator. He says, "Upon these facts, we have come to the conclusion that no excess of authority is proved, and therefore the objection to the award is not supported. * * Our judgment proceeds on this view of the effect of the affidavits; but we ought to add, that, in so limiting it, we do not intend to sanction the argument that the award would have been bad, if the umpire had given the compensation for contingent damage which the company alleged."

I can only gather from this case that the court adopted the view that the objections need not necessarily appear on the face of the award. Had the view been different, they would hardly have deferred judgment and then have elaborately discussed the merits opened in the affidavits.

Under the imperial acts, where the amount of compensation exceeds £50, the claimant can either elect to proceed by arbitration, or he may have a warrant to summon a jury to assess the amount. When the compensation is assessed by a jury, the party dissatisfied can remove the inquisition, &c., by *certiorari*, and move against it in the superior courts.

In *In re* Penny and The South Eastern Railway Company (7 E. & Bl. 660) this course was adopted. It was objected that the jury had included objectionable items in their finding. It was answered that still the court could not interfere if the proceedings were good on the face of the record. The court set aside the inquisition. *Wightman*, J., says, "It has been contended that it can issue only where the excess appears upon the face of the proceedings, but I am clearly of opinion that that is not so, and that the excess may be shewn upon affidavit." *Erle*, J., says, "Whether such excess of jurisdiction has been committed, I think may be properly determined from affidavits."

Of course there are many distinctions in form between the proceeding by arbitration and by inquisition. They are both creatures of the statute, and the only modes open to parties claiming compensation. Apart from positive authority, it is not easy to suggest any substantial reason why a compensation award for £1000 and an assessment by a jury of the like sum, should stand on different grounds. In the latter case the counsel, and even the sheriff as presiding, might press the jury to separate their finding, to let the desired objection be taken before the court, and the jury might persist in finding a general verdict. In the other case (as here) the counsel may entreat the arbitrators to specify the items of their finding, and they may refuse. The injustice is flagrant if such a refusal by jury or arbitrator should shut out the injured party from enquiry or relief. The court in the case last cited may not have dealt with the finding of the jury from any idea that it could be treated like any supposed improper verdict in a case pending in their own court, where the right of dealing absolutely with a verdict is inherent and original, flowing from their jurisdiction over the whole case. In the case of a statutable inquisition it seems to me somewhat different, and to rest on other grounds.

I have, therefore, arrived at the conclusion that it is open to us to enquire on affidavits if the arbitrators have awarded compensation for matters out of their jurisdiction.

I do not discuss the merits of their finding, as to the

propriety of the amount awarded, if it be for a proper ground of compensation.

It appears clearly from Manning's affidavit, and it is not denied on the other side, that it was objected, on behalf of the city, "that it was against the statute to include in favour of Leak the amount for the work he had done upon the esplanade," the other two arbitrators contending that he was legally entitled to such charge to be added to the price of the hundred feet.

Mr. Dalton's affidavit is to the same effect, and his letter to the arbitrators explicitly takes the same ground.

The affidavits filed in answer avoid any reference whatever to this pointed charge. Neither Mr. Cumberland nor Mr. Dennis vouchsafe any explanation whatever on the subject; and this silence, coupled with the refusal to accede to the earnest desire of the counsel for the city to embody in the award the items or grounds of compensation, can only lead my mind to the obvious conclusion that the applicants are right in contending that allowance has been made to Leak for the filling in done by him, to enhance the price allowed for the hundred feet.

I proceed, therefore, to consider if this be lawful.

The act of 1853 certainly contemplated no payment whatever to any water-lot owner. The corporation was allowed to make the esplanade, and the share of each water-lot owner for the cost of making it across his lot, if he did not elect to do it himself within a specified time, was to be ascertained by the city surveyor, or by arbitration, and became a charge on the land.

The question, therefore, turns on the act of 1857.

The first section empowers the corporation to make an esplanade one hundred feet wide across all water lots, to make a railway track thereon, or between that and the south side of Front Street.

Section 2 empowers the corporation to contract with the Grand Trunk Company, and others, for the filling up the whole space between the north limit of the esplanade and the bay shore, the expenses of such filling to be re-paid to the corporation by the owners of lots; the amount to be paid

to the corporation to be ascertained, firstly, by the city surveyor, as provided by the act of 1853, in respect of the esplanade, and all sums to be paid to the owners in respect of the lands taken for the purposes of the esplanade, as well as the amounts to be paid to the corporation by lessees or occupants of water lots belonging to the city, for the construction of the esplanade, or by any party or parties whomsoever, for the filling up, &c., of the space north of the esplanade, and if the same cannot be agreed on by the parties, to be settled by arbitration, as provided by the former act.

Section 3 gives power to raise money to fill in the space between the esplanade and the shore, &c., &c.

Section 4 recites that certain property to be conveyed to the water-lot owners was intended as a compensation for the land taken from them for the esplanade, and for the expense of making so much thereof as should be made on the lands taken from them; and then enacts "*that the owners be respectively charged with their respective shares of such expense*;" and if any owner be dissatisfied with any such compensation, his claim to a further allowance shall, if not agreed on, be determined by arbitration, as aforesaid, the arbitrators to consider the increased value of the lots, by means of the contemplated improvements, as well as all other matters connected therewith, also the value of the strips on the bank, and of the land in front to be conveyed to the owners; and if the increased value of the lots, and the value of the strips of land in front, together with the expense of constructing the esplanade, shall equal the value of the land taken for the esplanade, the arbitrators are to decide in favour of the city generally; and if it exceed the value of the land taken, then to decide that such excess be paid to the city in manner already provided.

Section 5 directs that moneys ordered to be paid by the city to the owners shall be paid in one year, &c., and how the moneys payable to the city shall be a charge upon the lands.

The remaining sections, 6, 7, and 8, have no bearing on the question.

I find a clear intention throughout the acts always to

throw the burden of constructing the esplanade across their lots upon the owners, giving them power to do it themselves, but if they omit doing so, the corporation may have the work done and charge the expense on the lots. This being, as I think, the clear general intention, it would require very strong words to enable arbitrators in substance wholly to shift this burden from the shoulders of the owners, and by making the value of the 100 feet taken for the esplanade *plus* the amount expended by the owner in doing the work, transfer this burden to the city.

I can see nothing in the statutes to warrant any such departure from the declared general intention of the whole scheme.

Section 4 alone gives any colour whatever to such an idea, but I think a careful examination of its language dispels any doubt.

I think its substance may be thus stated: a water lot owner says to the city, "You have taken 100 feet of my land, on which I have spent £500 in filling in; all you offer in return is the strip on the bank and the land in front. That is not enough compensation for me." The city replies, "You spent the £500 in doing what you were bound to do, and if you had not spent it we should have had to spend it and charge it to you." This dispute is referred to arbitration.

The referees find the 100 feet to be worth in its ordinary state £500, and that the owner has filled it up at a cost of another £500. If they adopt Mr. Leak's view they put down the 100 feet at £1000. They then find the value of the strips, &c., to be only £300. The city having no claim for filling, the amount to be paid to the owner will be £700.

If on the adjoining lot no filling has been done by the owner, they might find the value of the 100 feet to be £500, and that the corporation had done the filling at a cost of £500. If the strips, &c., be, as before, valued at £300, or £200 less than the value of the land taken, the account would stand thus: £200 balance in favour of owner on land value, to be deducted from the city's claim of £500 for filling, leaving chargeable against the owner £300.

Neither party I think should be a gainer or loser by the

fact of the filling in being done by one or the other, beyond the fair cost thereof. But the result of the two calculations given above shew a widely different result. They should not vary beyond the £500 cost of filling on either side. If done by the owner, he has not to pay the city for it; if done by the city, he is justly chargeable therewith.

In the one case above, where he does his own filling, he gets £700 from the city. In the other case, where the city spends the same amount in filling, and he spends nothing, the city gets only £300.

It seems to me that the right course is—the 100 feet of each lot being worth £500, the owner of each is credited with £200, the excess in value of the land taken over the land received. When he has done his own filling the city has no claim on him therefor. When he has not so done it, he is chargeable with the cost, less the £200 credit.

To adopt a different course would place the owner who had done his own filling at a vast advantage over his neighbour who had let the city do it for him. I am at a loss to understand the principle on which this can be allowed.

It is worthy of remark that in this fourth section, which directs what the arbitrators may find, the language used only provides for two events, one a general award in favour of the city, the other an assessment of the amount payable to the city for filling in.

The objection taken to the manner of execution of this award appears to me to be very serious. It is strongly urged on behalf of Leak that at the last meeting of the three arbitrators, on Friday, October 16th, they finally agreed (as it were) to disagree: that all items were discussed: that Manning, the dissenting arbitrator, was distinctly told of the amounts of compensation determined on by the other two, and that he expressed his clear dissent therefrom; and they parted on an understanding that they need not further discuss the matter.

Had this been so, and all the sums then discussed and agreed upon, and no substantial matter remaining undetermined, I think the authorities would uphold an award so made.

But after this meeting a formal request in writing was

made to Messrs. Dennis and Cumberland, on Saturday, the 17th, by Mr. Dalton, earnestly asking that the amount found on the different heads of claim might appear on the face of the award, so as to enable his clients to take the opinion of a court thereon. This was some days before the award was made. Manning swears that he did not know of this letter being written till after the award was made, nor was he ever consulted thereon, nor was the form of the award ever discussed between him and his co-referees, though had he known of this letter he should have desired to discuss it. As they parted at their final meeting, he says Mr. Dennis remarked "they would take care to draw the award so that it could not be set aside." Manning further states that he never had notice of any meeting to sign the award, or that it was ready for signature, nor was he ever asked to sign it. The affidavits of Messrs. Dennis and Cumberland admit that they did not think it necessary to consult Manning about Dalton's request. Mr. Dennis swears that he adopted this form "*advisedly, and from frequent experience in arbitrations.*"

The award bears date October 19th, and professes to be by all three referees, though signed by two only, and it awards one sum in bulk to Leak.

It is to be remarked that the very fact of the two arbitrators refusing to particularise the amounts on the face of the award, as requested, has created the chief difficulty in dealing with this application, and I can hardly look upon it as a matter of so little moment as not to require a discussion as to its adoption or rejection between the three referees. It was emphatically a case to which, to apply the words of *Wightman*, J., in Wade v. Dowling, (4 E. & B. 44,) "The parties referring their differences have a right to the joint judgment of the arbitrators exercised upon consideration up to the last moment." See also Helps v. Roblin, (6 C. P. 52:) Martin v. Kergan, (2 P. R. 371.)

I look upon it as a matter of equal importance with that of a request from one of the parties in difference to state a case for the opinion of the court under the common submission. I hardly think an award could be supported that was made by two arbitrators to whom such a request was made,

and who declined to accede to it, and made their award without ever informing their co-referee of any thing connected therewith.

I think, for the reasons already stated, this award must be set aside.

DRAPER, C. J.—The submission in this case was made under the statute 16 Vic., ch. 219, sec. 3., which first provides that the city surveyor shall declare by instrument under seal the amount which the owners of water lots shall pay the city for the construction of the esplanade across such lots, a copy of which instrument is to be served on the owner.

If the owner gives notice of refusal to pay the sum, three arbitrators are to be named, and their award, or that of any two of them, shall be final as to the amount chargeable on the said water lots respectively, and the owners thereof, for such improvement. The act does not provide for making the submission thus authorised a rule of court. The submission in the present instance however includes other subjects besides that above mentioned, and contains a condition that it may be made a rule of court; and even if it did not, the provisions of the 176th section of the Common Law Procedure Act seems to give either party power to apply to have it made a rule of court, as it contains no words purporting that the parties intended that it should not be made a rule of court. The Great Western Railway Co. v. Light, (1 P. R. 378,) was referred to as an authority to shew we had no jurisdiction, but in that case there was no agreement that the submission should be made a rule of court, and it was entered into before the passing of the Common Law Procedure Act.

The submission also involves matters arising under the statute 20 Vic., ch. 80, by which extended powers are given to the corporation of the city of Toronto to enter upon and take lands for the esplanade to the width of one hundred feet. Authority is also given to fill up and grade to the level of the esplanade the whole space lying between the northern limit thereof and the shore of the bay of Toronto; "and

the expenses of filling up and grading the same shall be ascertained in manner hereinafter mentioned, and shall be re-paid to the" corporation, by the owners, &c., of the land on which the grading, &c., shall be done. The amount to be paid to the city is to be ascertained by the city surveyor in the manner provided by the act 16 Vic., ch. 219, in respect to the esplanade, and all sums to the owners of water lots in fee for lands, &c., taken by the city for the purposes of the esplanade, as well as the amount to be paid to the city by the lessees or occupants of the water lots for the construction of the esplanade, or by any party for filling up, grading and levelling of the space north of the esplanade; and if the parties cannot agree it is to be settled by arbitration as provided by the former act.

The 4th section of this last statute recites, that the property directed by letters patent, dated 21st of February, 1840, to be conveyed to the owners of the water lots therein referred to, (as recited in the former act,) was intended as a compensation for the land which might be taken for the esplanade, and for the expense of making so much thereof as should be made on the lands taken from the respective owners, and enacts that the owners should be respectively charged with their shares of the expense; and if any owner should be dissatisfied with such compensation, his claim to a further allowance, if not agreed upon, shall be determined by arbitration as aforesaid; and the arbitrators are to take into consideration the increased value of the lots by means of the improvements contemplated by the acts, and the value of the strips of land between the same and the top of the bank, and of the land covered with water in front thereof to be conveyed to the owners in fee of the water lots; and if such increased value of the water lots, and the value of the strips of land and portions of land covered with water, together with the expense of constructing the esplanade, shall *equal* the value of the land taken for the esplanade, it shall be the duty of the arbitrators to decide in favour of the city generally; and if it shall *exceed* the value of the land taken, then to decide that such excess shall be paid to the city by the water-lot owners, in manner provided by the

former act for payment for the construction of the esplanade.

By section 5 all sums ordered to be paid by the city to the owners of the water lots shall be paid within one year from the date of the decision of the arbitrators, or from the date of any rule of court ordering the same, with interest, and the sum to be paid to the city, by the lessees of water lots or others for filling up, &c., shall be a charge upon the lands, as provided by the first act in respect to the esplanade.

Mr. Dalton has very strenuously urged the first objection on us. He contends that the patent of 1840, by which the city was authorised to lease water lots, and to convey to previous owners of water lots certain strips of land adjacent thereto, and also additional portions of land covered with water, expressly required that the water lots leased should be filled up at the lessees' expense, to the height of three feet from the water's edge of the bay to the south side of the esplanade, and that the leases should contain covenants from the lessees to this effect; and as to the strips of land and the additional portions, the conveyances thereof were to be subject to the like conditions, and to all general regulations as to lots which were designated in the patent by reference to a map attached thereto, both in respect to buildings and the construction of the esplanade thereon: that the act 16 Vic., ch. 219, as regards the esplanade, unequivocally affirms the duty of the owners of water lots, while the act 20 Vic., ch. 80, declares that the conveyances to be made under the letters patent by the city to such owners were intended as a compensation for the land taken for the esplanade and for the expense of the construction thereof, which if done by the city was made a charge on such lots; that this expense was thrown upon the owner by both acts, and no part of it therefore could properly form a charge on the part of the owner against the city; and that if, therefore, the arbitrators had in this case allowed to Leak any amount for work, &c., done at his expense, in partially constructing the esplanade across the water lot owned by him, their award is erroneous and should be set aside. And he desires to establish that this error had been committed by the evidence given before the arbitrators, a verified copy of which is attached to his affida-

vit, and by the affidavits of all three arbitrators, one filed by him, the other two on shewing cause; and that an award may be set aside for mistake or error if admitted by the arbitrators. See Heming v. Swinnerton, (1 Coop. C.C. 419,) citing Nichols v. Chalie.

He cannot point out any thing wrong on the face of the award, and he therefore in effect asks us to follow the case of *In re* Hall and Hinds, (2 M. & Gr. 847,) where the court set aside the award for a gross mistake of the arbitrators, as equivalent to misconduct on their part, though not apparent on the award. This case is spoken of approvingly by Lord *Denman*, C. J., in Hutchinson v. Shepperton, (13 Q. B. 955,) but though it has not that I am aware been expressly overruled, it is certainly shaken by the decisions and observations in Phillips v. Evans, (12 M. & W. 309,) Hodgkinson v. Fernie, (3 C. B. N. S. 189,) and Hodge v. Burgess, (3 H. & N. 293.) (See also Lancaster v. Hemington, 4 A. & E. 345.) The rule now adopted in courts of law seems to be, that an award good on its face is not to be set aside on the ground of mistake alone.

If our power to interfere was more extensive, (and I assume the agreement in the submission that it shall be made a rule of court gives us jurisdiction,) we should still have to determine that the alleged mistake, if established in fact, is a mistaken construction of the terms of the acts.

The first act authorises an arbitration to determine the sum which the owner of a water lot is to pay the city for constructing the esplanade across his lot, when he fails to do so; and it certainly provides no reimbursement to the owner beyond a conveyance of land and land covered with water under the patent of February, 1840.

The second act (20 Vic., ch. 80, sec. 4) declares that the property directed by these letters patent to be conveyed to the owners of water lots was intended as a compensation for the land which might be taken for the esplanade, and for the expense of constructing the same across the several lots. And then—after enacting "that the owners be respectively charged with their respective shares of such expense," (a matter provided for by the first act)—it authorises an arbitration be-

tween the city and any water-lot owner dissatisfied with the compensation already provided, giving certain specific directions as to the course to be followed by the arbitrators.

The apparent meaning of the enacting part of this section of the act I take to be, that the arbitrators are to charge against the water-lot owner,

1. The increase in the value of his water-lot "by means of the improvements" contemplated by this act:

2. The value of the strips of land between the same (*i.e.*, the water lot) and the top of the bank:

3. The value of the land covered with water in front thereof, (*i.e.*, of the water lot,) to be conveyed to the owner of such lot under the provisions of the first act.

If these three amounts, "*together with* the expense of constructing the said esplanade, shall equal the value of the land taken for the esplanade, it shall be the duty of the arbitrators to decide in favour of the city generally; and if *it* shall exceed the value of the land taken, then to decide that such excess shall be paid to the city by the said water lot owners," in manner provided by the first act for payments to the city for the construction of the esplanade. I understand this last passage thus: if the three amounts, together with the cost of constructing the esplanade, exceed the value of the land taken, the arbitrators must award the excess to be paid by the water-lot owner to the city.

The enacting part of this section, while plainly directing an award, under given circumstances, in favour of the city, only inferentially authorises one in favour of the owner of a water lot, by providing that the claims of a dissatisfied owner of any such lot to a further allowance shall, if not agreed on, be determined by arbitration. The authority to award in his favour must, I presume, be implied from the language used, but still the positive directions as to what the arbitrators are to take into their account clearly apply to the whole subject matter of reference, and make the expense of constructing the esplanade a charge against and not for the water-lot owners, leaving nothing on their side except the value of the land taken from them, as to which the second section has already provided for an arbitration in

case of dispute. But this appears to be at variance with the preamble, which asserts that the property to be conveyed under the letters patent by the city to water-lot owners was intended as a compensation both for the land taken and for the expense of constructing the esplanade on such water lot; and the enacting part immediately after provides an arbitration for the owner dissatisfied "with any such compensation."

The second section, which recognises the right of the water lot owners to be paid for the land taken on which to construct the esplanade, and which provides for ascertaining the value either by the city surveyor or by arbitration, affords also an object to which to apply the words at the beginning of the fifth section, "All sums of money ordered to be paid" by the city "to the owners of the said water lots in fee shall be paid within one year from the date of the decision of the arbitrators;" but it does not help to remove the incongruity between the different parts of section 4, in which the apparently plain direction to place the expense of constructing the esplanade against the value of the land taken from the water-lot owner, seems opposed to the intention stated as to the property directed by the letters patent to be conveyed to him.

It is not, in my view, necessary to resolve this question, in order to dispose of the first objection taken by Mr. Dalton. The facts necessary to raise it do not appear on the face of the award, and admitting that if the mistake be pointed out by the affidavit of the arbitrator, the court will sometimes interfere (Hutchinson v. Shepperton, 13 Q. B. 955,) the affidavits of those arbitrators by whom the award was made disclaim any mistake or injustice; and after the conflict of authority has settled down into the rule previously enunciated, I am disinclined to adopt new distinctions to evade its application.

Great reliance has, however, been placed on *In re* Brogden and the Llynvi Valley Railway Company, (9 C. B. N. S. 229,) as in effect deciding that in a case analogous to the present the court had power to set aside the award upon grounds not apparent on its face, because they did not dispose of the case on that objection, which was raised by

Brogden's counsel, and was contested by the counsel for the railway company; and that the proper inference is, that the court would not have troubled themselves to enquire into the merits, unless, if the merits had been with the company, relief could have been granted. The counsel for the railway advanced this proposition—that admitting the general rule that the court will not interfere for a mistake of arbitrators, whether of fact or law, which did not appear on the face of the award, yet that these references under the Lands Clauses Consolidation Act constituted an exception, because the parties to such references were compelled to submit to arbitration, and had no means of agreeing beforehand what subjects should be submitted, the statute having settled this. I believe there is no case which affirms this proposition directly, and I think it but reasonable to hold that if the court there meant to lay it down for the first time, they would have said so, and made it at least one ground for their judgment; but they do not say one word on this point, but decide against the company on the facts; and *Erle*, C. J., at the close of his judgment, expressly states that it proceeds on the view taken by the court of the affidavits on both sides. The reporter certainly did not understand the court to mean more than they expressed, for he condenses the decision thus:—"*Held*, that it *did not appear upon the face of the award* that the umpire had exceeded his jurisdiction."

One of the arguments of the counsel for the company was, that the 37th section of the Lands Clauses Consolidation Act shewed that the jurisdiction of the courts was not intended to be ousted as to matters of substance, for that section provides that no award shall be "set aside for irregularity or error in matter of form." Whatever may be the worth of that argument, it does not help the present case, for the statutes now under consideration contain no such provision, while they do declare that an award made under their authority shall be final. In this case, however, as already noticed, the submission goes beyond these statutes, as it is made by bond containing an agreement that it may be made a rule of court. If it is to be treated as a submission under the statute of Wm. III., the general rule applies; if under

the special acts, either the legislature have made the award final, or it is embraced within the same general rule.

The second objection is untenable, as all charges of fraud or corruption are expressly disclaimed. If it was intended to complain of more than is involved in moving against the verdict of a jury for excessive damages, the objection should have been so expressed: that is, if the value adopted by the arbitrators in favour of Leak is so extravagant as to afford evidence of corruption or partiality, the award should have been attacked on that ground.

The third objection is not, I think, sustainable to the extent of setting the award aside. The arbitrators have clearly exceeded their authority, according to section 5 of the act 20 Vic., by ordering the city to pay the sum awarded forthwith; but this direction may be set aside. To this extent the award is bad, but the objectionable part appears to me separable from the residue.

As to the last objection, I think that the affidavits of the three arbitrators establish that they had discussed all the matters on which they were or believed themselves to be called on to award, and that each was aware of the judgment formed by the others on the several points; and that when Manning parted from the other two, the disagreement between him and them was fully and finally understood. I think, therefore, the foundation for this objection is taken away. I refer to White v. Sharp, (12 M. & W. 712,) *In re* Pering and Keymer (3 A. & E. 245) *In re* Templeman and Reed, (9 Dowl. 962.)

A letter written by a counsel for either party is not more than if he had found the two arbitrators together, and had just before the execution of the award addressed them to the same effect. It advanced no new fact or evidence.

On the whole, I am of opinion that so much of the award as directs the payment to Leak "forthwith" must be set aside, and that the rule must be discharged as to the residue.

It is not without reluctance that I have arrived at this conclusion. The disregard of the request contained in Mr. Dalton's letter was strictly speaking a matter within the discretion of the arbitrators, though a compliance with it

would only have afforded an opportunity for correcting any error into which the arbitrators might inadvertently have fallen. There are some statements in the affidavits leading to the conclusion that one at least of the two arbitrators who made the award did not desire to furnish any facility for reviewing the decision, even although possibly it might be in opposition to the spirit of the statutes or productive of great injustice. The rule, however, does not found any specific objection on this, and we cannot, I think, therefore assume that it really does afford a substantial ground for impeaching the award. It is for the legislature, not for the courts, to determine whether in awards made upon submissions of this character the items allowed or rejected on either side should be stated by the arbitrators for the information of parties.

I have not failed to consider the observations made on the ground that the submission was compulsory in the case of the Great Western Railway Company v. Baby, (12 U. C. R. 106,) where the court did set aside the award on the ground that the arbitrators had not conformed to the statute in making their estimate, but made the company pay most extravagantly for the expected advantage of an immense trade which the railway was expected to bring, and for the enhancement of the value of the plaintiff's property by that trade. The objection certainly appeared only on the affidavits, but the exorbitance of the amount awarded was pointed out in the rule as evidence of corruption in the arbitrators, which is not charged before us. In that case the court was, I may say, startled with the award, which gave more pounds for the land than it would have produced shillings if sold at that time, or probably at any time since, but the case was not decided on the ground that being a compulsory submission the court would apply other principles of decision than those which govern in respect to awards generally, nor have I found any case going that length. It is to be observed, also, that in that case the act incorporating the company expressly gave power to the courts to review the award.

In re Penny (7 E. & B. 660) affords perhaps the nearest analogy. There the court set aside an inquisition and find-

ing of a jury on its being shewn upon affidavit that they had awarded compensation on a claim as to which they had no jurisdiction; but in my humble judgment it only requires to read the case attentively to perceive that it is decided upon reasons not applicable to this.

I refer also to Martin v. Kergan, (2 P. R. 373,) *In re* Bluck and Boyes, (22 L. J. C. B. 173,) Knight v. Burton, (6 Mod. 231,) Dy. 183, in margin.

Rule absolute.—*Draper*, C. J., dissenting.